No. 4518

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FAGEOL TRUCK, License No. 55916, Engine No. 34822, Its Tools and Appurtenances, WHITE COMPANY, Claimant,
Appellee.

BRIEF FOR APPELLANT

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STATEMENT.

This is an appeal from the decree of the District Court of the Northern District of California given in a case of a libel for condemnation of a motor truck seized by the Internal Revenue Department. The libel was filed June 7, 1924, the relevant allegations being as follows:

I.

"That on or about the 5th day of June, 1924, on Half Moon Bay Road, County of San Mateo, and within the Southern Division of the Northern District of California, and within the jurisdiction of the United States and this Honorable

Court, D. W. Rinckel, duly authorized, appointed and acting agent of the Internal Revenue Department of the United States, seized a certain Fageol Truck, License No. 55-916, Engine No. 34822, its tools and appurtenances, which was being operated by Leonard Brooks, in which said automobile there was then and prior thereto, concealed and deposited certain goods, merchandise and commodities to wit: 410 cases Scotch whiskey, the same being alcoholic distilled spirits, upon which there was then due certain tax imposed by Section 600 of the Revenue Act of 1921.

II.

That the said tax due and imposed, as aforesaid, had not been paid, and the said goods, merchandise and commodities were concealed, deposited and removed in said automobile with the intent to defraud the United States of the said tax.

III.

That the said deposit, concealment and removal of the said goods and commodities in said automobile was and is a violation of the provisions of Section 3450 of the Revised Statutes of the United States, and the said automobile, its tools and appurtenances are subject to condemnation, forfeiture and sale."

Thereafter the White Company, a corporation, having filed its claim to be the owner of the truck, filed exceptions to the libel, the exceptions in brief being that the libel of information does not state suf-

ficient facts to condemn the truck in that Section 3450 of the Revised Statutes upon which the libel is based had been repealed and was no longer in effect. Additional grounds were certain assignments of uncertainty.

Upon consideration, the court sustained the exceptions to the libel without leave to amend, and directed the libel to be dismissed, and on August 25, 1924, entered its decree accordingly.

The assignments of error are,

(a) That the court erred in sustaining the exceptions,

(b) That the court erred in sustaining exceptions without leave to amend,

(c) That the court erred in dismissing the libel on sustaining exceptions,

(d) That the court erred in directing the automobile to be returned to claimant,

(e) That the court erred in holding that the libel was not sufficient in law to state a cause of action for condemnation of the automobile, and

(f) That the court erred in holding and deciding that the libel was not maintainable under Section 3450 of the Revised Statutes.

As we understand it, the practical question involved in this appeal is whether or not Section 3450 of the Revised Statutes has been repealed impliedly by the National Prohibition Act, at least as far as concerns intoxicating liquors.

ARGUMENT.

I.

Section 3450 of the Revised Statutes, at the times material in the case at bar, was in full force and effect.

It was the view of the District Court that Section 3450 of the Revised Statutes had been impliedly appealed or superseded by the National Prohibition Act and, accordingly, that a libel based avowedly upon such section and filed as the result of seizure where the merchandise was intoxicating liquors could not be maintained.

The defect in the libel found by the court was fundamental; in its view the libel could not be perfected by amendment, and hence it gave no consideration to any special defect of pleading.

That Section 3450 of the Revised Statutes was impliedly repealed or superseded *pro tanto,* as far as concerns intoxicating liquors, has been expressly held by this court in the case of

McDowell vs. U. S., 286 Fed. 521.

This holding was based upon the ruling of the Supreme Court of the United States in the case of

U. S. vs. Yuginovich, 256 U. S. 450.

If the law were to be considered the same when the instant case arose as it was when the McDowell case

was decided, we would not need to give the cause any further consideration.

But in 1921 Congress passed the Act supplemental to the National Prohibition Act, known as the Willis-Campbell Act, 42 Stat. 222. Section 5 of the Act is as follows:

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provisions of the National Prohibition Act or of this Act." Section 5, Act. Nov. 23, 1921, 42 Stat. 222 (Comp. St. Ann. Supp. 1923, Sec. 10138 4/5c).

The effect of this amendment came under consideration by the Supreme Court of the United States in the case of

U. S. vs. Stafoff, 260 U. S. 477, 67 L. Ed. 358.

It was there determined that as to offenses arising subsequent to the passage of the Willis-Campbell Act, the holding of the court in *United States vs. Yuginovich* did not apply; that the decision in that case that must stand for the law previous to November 23, 1921.

Accordingly, it is submitted that in cases arising at the time the instant case arose the government has the choice of proceeding under Section 3450 of the

Revised Statutes or Section 26 of the National Prohibition Act in cases where it has seized and seeks to condemn an automobile or truck used for the removal of intoxicating liquors where they are untax-paid. If the proceeding be under Section 3450 of the Revised Statutes, it is submitted that it is to be considered that the car as the "res" is the real offender, the remedy being available whether there be a conviction or not.

II.

Section 3450 R. S., being unrepealed, is available for relief in the instant case.

That the United States has power in appropriate proceedings to forfeit as an offending "res" an automobile being used to defraud the revenue, and this regardless of the alleged good faith of a claimant, has been definitely settled in the case of

J. W. Goldsmith, Jr.,-Grant Co. vs. U. S., 254 U. S. 505, 65 L. Ed. 376,

in which the Supreme Court of the United States said:

> "Congress must have taken into account the necessities of the government, its revenues and policies, and was faced with the necessity of making provision against their violation or evasion, and the ways and means of violation or evasion. In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said that Congress interposes the care and responsibility of their owners in aid of the

prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of deodand, by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited. To the superstitious reason to which the rule was ascribed, Blackstone adds that "that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punishable by such forfeiture", and

"But whether the reason for section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced. *Dobbins Distillery vs. United States,* 96 U. S. 395, 24 L. Ed. 637, is an example of the rulings we have before made. It cites and reviews prior cases, applying their doctrine, and sustaining the constitutionality of such laws. It militates, therefore, against the view that section 3450 is not applicable to a property whose owner is without guilt. In other words, it is the ruling of that case, based on prior cases, that the thing is primarily considered the offender."

Accordingly there are no constitutional or legal difficulties to the maintenance of the instant libel if the case is brought within the terms of the section referred to.

III.

Under the law there was a tax due to the United States.

According to the allegations of the libel of information, one Brooks, in the offending car, was transporting intoxicating liquors. It is expressly alleged that there was due a certain tax imposed by Section 600 of the Revenue Act of 1918, as amended by the Revenue Act of 1921. It was further alleged that the tax so due and imposed had not been paid, and that the goods were concealed, deposited and *removed* in said automobile with intent to defraud the United States of the said tax. If it then appears that there was no insuperable legal objection to the incidence of the tax upon the described merchandise, under the circumstances stated, it must be taken that there was in fact a tax unpaid.

That such tax was so imposed has been expressly declared by this court in the case of

Violette vs. Walsh, 282 Fed. 582.

In that case, affirming a similar decision of the District Court of Montana, reported under the same title in 272 Fed. 1014, the court stated that there was a liability for the tax under Section 600-a of the Act of February 24, 1919, and Title II, Section 35 of the National Prohibition Act. (The Revenue Act so referred to is otherwise denominated as the Revenue Act of 1918.)

It will be noted that the decision in question was subsequent to the decision in

Lipke vs. Lederer, 259 U. S. 557,

thus recognizing that there was a tax due on the liquors in question other than the so-called penalties discussed in the case of *Lipke vs. Lederer.* And it will be noted that in the Lipke case the bill of complaint contained the averment that all internal revenue taxes had been paid, the contention being over penalties as distinguished from such taxes.

Section 600 (a) of the Revenue Act of 1918 (the Act approved February 24, 1919) provides:

> "That there shall be levied and collected on all distilled spirits now in bond or that have been or that may be hereafter produced in or imported into the United States, except such distilled spirits as are subject to the tax provided in section 604, in lieu of the internal revenue taxes now imposed thereon by law, a tax of $2.20 (or, if withdrawn for beverage purposes or for use in the manufacture or production of any article used or intended for use as a beverage, a tax of $6.40) on each proof gallon, or wine gallon when below proof, and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn, and collected under the provisions of existing law."

The section provides for the payment on distilled spirits of a tax of $2.20 per gallon, unless withdrawn or used for beverage purposes, when the tax is $6.40.

The section has been construed by the Circuit Court of Appeals of the Sixth Circuit in the case of

Hamilton vs. Kentucky Distilleries Co.,
283 Fed. 326,

wherein that court reached the conclusion that the word "withdrawn" was equivalent to "removed", and that thus the tax became payable, even when the liquors were stolen from the warehouse.

Upon the authority of the same case it may be said that the tax of $2.20 per gallon imposed by this statute is fixed definite and certain and attaches immediately to distilled spirits, although a claim for such may not arise until the spirits are withdrawn. It would result that the tax accrued when the liquors were manufactured, as against the distiller, or when imported, or more accurately stated, when smuggled, as against the importer.

Congress has thus manifested a purpose, as far as it is possible to so enact, of taxing distilled spirits whether licit or illicit. (See Section 5 of Willis-Campbell Act, supra.)

Section 3450 is a law passed in the interest of the public revenue for the punishment of evaders of taxes, while Section 26 was enacted for the punishment of violators of prohibition engaged in the unlawful traffic in intoxicating liquors. The objects of said statutes are different, the subject matter largely different, and the *modus operandi* very much different. Section 3450 affects only untaxpaid liquors.

It also operates upon a vehicle, although not in motion, used in the unlawful removal. It has no commiseration for the unoffending third party in interest. Section 26 applies to intoxicating liquors, regardless of taxes, transported in violation of the National Prohibition Act. The vehicle must be seized while in motion. The offending person must be convicted before the confiscation of the vehicle can be effected. As pointed out, Section 26 provides a very generous method for innocent owners and lien holders to come in and establish their claims.

If illicit liquor is not subject to tax, it may be doubted whether the unlawful income of the contraband seller is subject to income tax, this in view of the conclusions reached in the case of

Pollock vs. Farmers Loan and Trust Co., 157 U. S. 429, 581,

that where the source is not subject to taxation, neither is the income.

IV.

The libel of informaton showed that in the automobile there was then and prior thereto concealed and deposited certain whiskey upon which there was a tax due; and further that the said goods were concealed, deposited and removed in said automobile with the intent to defraud the United States of the said tax.

There being a tax due and unpaid on the whiskey referred to, the remaining facts necessary to bring

the case within the provisions of Section 3450 were that the goods were "removed" or are "deposited," or "concealed" in any place with intent to defraud the United States of such tax. The allegations of the libel bring the case within such portions of the statute. It was there alleged in Paragraph I, that the truck was seized "in which said automobile there was then and prior thereto concealed and deposited" certain goods, referring to 410 cases scotch whiskey, and it was further alleged in Paragraph II that the tax so due had not been paid "and the said goods, merchandise and commodities were concealed, deposited and removed in said automobile with intent to defraud the United States of the said tax", and it was further alleged that said deposit, concealment and removal of the said goods was and is a violation of the provisions of Section 3450 R. S., and that the automobile, its tools and appurtenances are subject to condemnation, forfeiture and sale. Thus the allegations of the libel of information were amply sufficient to state a case for condemnation and forfeiture under the terms of the section referred to.

Reasonably construing the libel, it appears to us that it must be deemed to be sufficient to require any claimant to go to trial upon questions of fact. The court sustained exceptions to the libel, as we understand it, upon the ground first stated in the exceptions, to wit, that the section had been repealed, at least as far as intoxicating liquors are concerned.

There is thus a direct averment that the goods were

concealed in the automobile with intent to defraud the United States of a tax; that they were *deposited* therein with like intent and that they were *removed* with intent to defraud the United States of the tax. The pleader thus states the case within the language of the statute. We are unable to understand why the averments are not to be held sufficient.

V.

There is nothing in the situation disclosed by the libel in the instant case sufficient to break the force of the considerations adverted to in the preceding paragraph.

The learned Judge, in deciding the instant case and similar cases, stated his views in a letter to counsel for the government as follows:

> "In view of the construction which has been placed upon Section 3450 of the Revised Statutes by our Circuit Court, I am of the opinion that Libel proceedings against automobiles in liquor cases are not maintainable. I have in mind the cases of *United States vs. One Premier Automobile,* 297 Fed. 1007; *United States vs. One Kissel Touring Automobile,* 296 Fed. 688, and 289 Fed. 120, and *United States vs. One Studebaker Automobile,* 298 Fed. 191 (July 3, 1924, D. C. Tex.). There are a number of decisions to the same effect which I will hand you in a few days."

Consideration may be given to the cases so cited.

In the case of

United States vs. One Premier Automobile,
297 Fed. 1007,

this court affirmed the judgment of the lower court, apparently given after a trial, wherein the lower court would have been required to determine questions of fact. Among the facts so determined was that the matter related to certain cocaine and that the only deposit, concealment or removal could have been where the driver of an automobile had the capsules of cocaine on his person. The court refers with approval to the reasoning of Judge Cushman in the case of

United States vs. One Ford Automobile Truck
286 Fed. 204 (D. C.),

and the court in particular approved the reasoning to the effect that the "removal" was from particularly specified places, and that in any event in that case there was not a removal of the cocaine but a "removal of the possessor," who had it on his person.

Referring to the decision so cited, it is seen that the case before Judge Cushman was a similar case, the case being tried before the court without a jury; evidence was taken from which it appeared that the drugs were carried on the persons of the individuals driving the automobiles. Upon such considerations the court reasoned that the narcotics were not "concealed" in the automobile but were "concealed" upon the person. Similarly there was not a "deposit" in the automobile but a "deposit" in the pocket of the

driver. Referring to the word "removal", the court noted two possible meanings, and adopted one meaning, "to move away from the position occupied." So reasoning, the court said: "if used in the former sense, if it is sufficiently charged in the information it has *not been sufficiently proven.*" The court further reasoned that the word "removal" in the statute referred to removal from some place where the tax became due. In the instant case the tax became due from the distiller in case of a manufacturer, or from the importer, in the case of an importation. Accordingly so construing the word "removed", it would have meant a removal of the goods from the point of manufacture, unless they were clandestinely smuggled, when it would mean from the point of importation. But if the word "removal" has such meaning in the statute, it may be deemed to have such meaning in the pleading, and it would connote the removal of the spirits from the point of importation where the tax became due.

Moreover, the facts of the two cases cited show that there could have been no deposit or concealment of the goods in the car, because they were deposited and concealed on the persons. While taking the averments of the instant case, the merchandise was more bulky, consisting of 410 cases of scotch whiskey, and it is expressly averred to have been concealed and deposited in the car rather than on the person of the driver. Thus the two cases cited are to be distinguished in that the cases were considered not upon the *suffi-*

ciency of the *libel* but upon the *sufficiency* of the *proof,* and that upon such proofs it appeared that the goods could not have been deposited or concealed, being in the pocket of the driver.

The same distinctions arise from the consideration of the two opinions in the case of

U. S. vs. One Kissel Touring Automobile, 289 Fed. 120, 296 Fed. 688.

In the former case the decision was by Judge Dooling at a trial. It appears that there had been an agreed statement of facts, but there was no agreement that the acts were with intent to defraud the government of the taxes. (See Opinion of Judge Rudkin.) Judge Dooling reached the same conclusion as reached in the earlier cases to the effect that the narcotics there involved were not concealed or deposited *in the car* but were in the *pocket* of the *driver* and thus not within the meaning of the statute. He further reasoned that the word "removed" was not synonymous with transportation, but had "reference to the removal from some definite place where the *tax imposed is due and where it should be paid before the taxed articles are taken therefrom.*" The court agreed with the reasoning of Judge Cushman in the case cited above.

In the same case on appeal, in the opinion by Judge Rudkin, he pointed out that the agreed statement of the case was silent on the issue of intent to defraud but the court had found that the intent to defraud

was not proven and dismissed the action. The appellate court further reasoned that it could not be said that the intent to defraud followed from the stipulated facts as a conclusion of law, which was the only thing they were concerned with. Whether it followed as an inference of fact was a matter to be determined by the trial court. And it could not be said that his determination was unreasonable since there was only a one cent tax due on the goods carried in the pocket of the driver, while driving in a valuable automobile.

Thus these two cases turn upon the consideration that the concealment and deposit was in the pocket of the driver; that it was a small amount of narcotics upon which a tax of one cent could be due, and that it would be a rather violent assumption of facts to declare that there was an intent to defraud the government of a tax.

The final case cited by Judge Kerrigan,

> *U. S. vs. One Studebaker Automobile,* 298 Fed. 191,

was a case of the same type in this, that there was a trial, or at least a decision upon questions of fact, and that on the case made there was a small amount of narcotics, 10 ounces of cocaine, concealed in the pocket of the driver.

It thus appears that from all of the cases so cited and from others that could be cited applying the same meaning to the word "removed", there had been trials of the questions of fact and the court was un-

able to draw the inference of fact that there was a removal within the meaning of the statute or a concealment or deposit in the car as distinguished from the pocket of the driver, and that the element of intent to defraud could not reasonably be inferred on account of the smallness of the tax, and the value of the car. No such considerations are present in the instant case.

It may be noted, that if the libels of information in the cases cited had been deemed insufficient there would not have been a trial.

Nor can it be said in the instant case that there was no possibility on the part of the government of proving a case.

In the first place under the provisions of Section 3333 of the Revised Statutes when a seizure is made of distilled spirits under the circumstances pleaded, the burden of proof shall be upon the claimant of the spirits to show that no fraud has been committed and that all requirements of the law in relation to the payment of the tax have been complied with.

And it is quite likely in the instant case that the government would have little difficulty in proving that it had intercepted the movement of a large quantity of spirits from a point of its unlawful importation. The car was on the Half Moon Bay Road in San Mateo County and thus on the road between the shore of the Pacific Ocean and San Francisco, and it was not a violent assumption that the government

could have proven the averment by showing that the car was going to San Francisco where there was a large market and coming from a cove or secret landing where liquors have been clandestinely introduced; that there was not distillery or warehouse in the vicinity from which the spirits could have been moved and that thus they were being removed from the point of importation.

Moreover, it could not be questioned but that the goods were concealed and deposited in the car. And it can easily be understood that the government could under the allegation have established that there was anywhere from $2000 to $6000 tax due on the quantity of liquor involved. The importer is considered to have known this fact and it is no violent assumption that the government could have been able to show that he intended not to pay this tax but to sell the liquor without so paying, these considerations, of course, reinforcing the presumption of law declared in the section last cited.

It has been otherwise argued that the court cannot infer the intent to evade the tax, since the government would not have accepted a tax from the importer but would have seized his liquor and arrested him for the importation. But since, as we have seen, the government can tax illicit enterprises and that it has taxed the spirits involved in the instant case, there is certainly a liability on the part of the importer or distiller to pay the tax. And that he may intend to violate some other law does not prevent

him from also having the intent to evade the tax and thus defraud the government of it.

The case is not the same as the case of the transportation of a small amount of the narcotics with an infinitesimal amount of tax due and in which the court might refuse to draw the inference of fact that there was a conscious intent to defraud.

CONCLUSION.

It is submitted that we have shown that Section 3450 of the Revised Statutes has not been repealed in any respect; (1) that if it ever was deemed to have been repealed in regard to intoxicating liquors, it has been revived by the terms of the Willis-Campbell Act;

(2) That the section and the construction here contended for is entirely valid;

(3) That Congress has power and has exercised the power to tax spiritous liquors, whether licit or illicit;

(4) That the tax in the instant case thus accruing was not paid;

(5) That the proper officers seized the automobile in question, while it was being used for the removal, concealment and deposit of the illicit liquors with the intent to evade the tax, and

(6) That the government should have been allowed to prove the allegations and thus secure the condemnation and forfeiture of the car.

Respectfully submitted,

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